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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRIENDS OF GATEWAY, EDUCATORS OF GATEWAY, FLOYD BENNETT FIELD GARDENS ASSOCIATION,

Petitioners,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, JANE GARVEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Second Circuit err in deciding that the installation of a Terminal Doppler Weather Radar within the Gateway National Recreation Area does not violate the express statutory language of 16 U.S.C. § 460cc 2(e), prohibiting the expansion of "air facilities" at this recreational site.

PARTIES BELOW

Friends of Gateway is an organization of park users dedicated to protecting and improving the park, as well as enhancing public awareness of and access to the park.

Educators for Gateway (EFG) is an organization of teachers and educators who utilize the park's natural resources for environmental education. The group's main goal is to support the Gateway Environmental Study Center Throughout the year EFG sponsors programs and workshops for teachers at the park. EFG, in conjunction with the New York City Board of Education, also runs a program that brings children to the park for an overnight camping and educational experience.

The Floyd Bennett Gardens Association maintains the largest community garden in the United States on land within Floyd Bennett Field, which is adjacent to the site proposed for the TDWR. The garden plots in this five acre site are tended by more than 400 members during the growing seasons.

The members of these organizations regularly and frequently use Gateway National Recreation Area and are directly and substantially impacted by the construction and operation of a Terminal Doppler Weather Radar on its parklands.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit was filed on July 9, 2001. *Friends of Gateway v. Slater*, No. 99-4081 (2d Cir., filed July 9, 2001). This decision is provided in the Appendix to this petition.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court of Appeals was entered on July 09, 2001. Additionally, the jurisdiction of this Court is invoked under the Court's Rule 10(a); the Court of Appeals in this matter has departed from the accepted and usual course of judicial proceedings by entering a judgment that unequivocally contradicts the well established rule of law as previously decided by this Court.

STATUTORY PROVISIONS

16 U.S.C. § 460cc(a)(1) (2000):

> **§ 460cc. Establishment**
> In order to preserve and protect for the use and enjoyment of present and future generations an area possessing outstanding natural and recreational features, the Gateway National Recreation Area (hereinafter referred to as the "recreation area") is hereby established.
>
> **(a) Composition and boundaries**
> The recreation area shall comprise the following lands, waters, marshes, and submerged lands in the New York Harbor area generally depicted on the map entitled "Boundary Map, Gateway National

Recreation Area," numbered 951-40017 sheets 1 through 3 and dated May, 1972:

(1) Jamaica Bay Unit – including all islands, marshes, hassocks, submerged lands, and waters in Jamaica Bay, Floyd Bennett Field, the lands generally located between highway route 27A and Jamaica Bay and the area of Jamaica Bay up to the shoreline of John F. Kennedy International Airport.

(e) Airway facilities; maintenance, operation, and installation; Jamaica Bay and Floyd Bennett Field restrictions

The authority of the Secretary of Transportation to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with the establishment, maintenance, and operation of airway facilities: Provided, that nothing in this section shall authorize the expansion of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field.

49 U.S.C. § 44501(a) (2000):

> **(a) Long range plans and policy requirements.**—The Administrator of the Federal Aviation Administration shall make long range plans and policy for the orderly development and use of the navigable airspace and the orderly development and location of air navigation facilities, that will best meet the need of, and serve the interests of, civil aeronautics and the national defense, except for the needs of the armed forces that are peculiar to air warfare and primarily of military concern.

49 U.S.C. § 44502(a)(1) (2000):

> **(a) General authority.**—(1) The Administrator of the Federal Aviation Administration may—
>
> (A) acquire, establish, improve, operate and maintain air navigation facilities; and
>
> (B) provide facilities and personnel to regulate and protect air traffic.

STATEMENT OF THE CASE

This matter concerns whether the Federal Aviation Administration (FAA) can lawfully install a Terminal Doppler Weather Radar (TDWR) within the confines of Gateway National Recreation Area (Gateway) in contravention of the intent of Congress.

In 1972, Floyd Bennett Field and surrounding areas in Brooklyn, Queens and northern New Jersey were designated as national parkland pursuant to the Gateway Act. Gateway Act of 1972, Pub. L. 92-592 §2, codified at 16

U.S.C. § 460cc. Along with the Golden Gate National Recreation Area, Gateway National Recreation Area was designated as one of two "urban parks" in the country. On March 29, 1999, the Federal Aviation Administration issued a Record of Decision (ROD) ordering the installation of a TDWR system at the United States Coast Guard Air Station, Brooklyn, also known as Floyd Bennett Field, within Gateway.

Gateway was created to give residents of the New York and New Jersey metropolitan region access to national park space in a densely populated area where open space and pastoral refuge is generally lacking. In fact, the Park's primary purpose was and remains to bring the benefits of the national parks closer to urban residents. In its entirety, Gateway contains ocean beaches, dunes, woodlands, bays, a wildlife refuge, as well as two historic airfields and the nation's oldest operating lighthouse. The park serves as a major source of outdoor space for activities such as swimming, boating, fishing, bird watching and horseback riding.

Each year, upwards of four million people visit Gateway. Of this number, 750,000 visit Floyd Bennett Field alone. In addition, 50,000 students attend educational programs at Floyd Bennett Field every year. Other groups who use and enjoy Gateway regularly include members of the petitioner organizations: The Friends of Gateway, Educators for Gateway, and The Floyd Bennett Gardens Association.

The Jamaica Bay unit of Gateway encompasses approximately 4,450 acres of land and marshland in and near Jamaica Bay. The unit is divided into three subdivisions: Floyd Bennett Field, North Shore, and Jamaica Bay Wildlife Refuge. Floyd Bennett Field was New York City's first

municipal airport. It was later converted into the United States Coast Guard (USCG) Air Station - Brooklyn. Today, Floyd Bennett Field encompasses about 1,448 acres and is divided between public and governmental uses.

The public areas of Floyd Bennett Field include Hangar Row, the North 40 Nature Trail and miles of former runways used for cycling or in-line skating. Festivals, outdoor concerts and other special events are held at the site during the summer and fall seasons. The governmental area of Floyd Bennett Field includes the USCG Air Station. In 1997, the Department of Transportation (DOT)—as the parent agency of both the Coast Guard and the FAA—reassigned from the Coast Guard to the FAA 1.8 acres in the middle of the Coast Guard Air Station. In 1998, the DOT transferred administration of the remainder of the property under its control (not including the 1.8 acre parcel) to the Department of Interior (DOI). The site of the Radar Tower is on the 1.8 acres of FAA property.

TDWR is an automated weather surveillance system designed to provide warnings to approaching and departing aircraft of potentially dangerous weather conditions, such as wind shear. Following a series of air crashes that were blamed on wind shear or other serious weather conditions, Congress authorized the FAA to develop a system to detect these conditions. TDWR was the result of that project.

The Gateway TDWR, which is constructed but not operational, is comprised of an 82-foot tall steel lattice tower supporting a 33-foot tall, 37-foot diameter spherical dome enclosing a 25-foot diameter parabolic dish antenna. The facility also includes a 26-foot by 46-foot building to house the backup generator and computer equipment, as well as above ground diesel fuel tanks with the capacity of about 1,300 gallons to power the backup generator. *See Friends of*

Gateway v. Slater, No. 99-4081, at 6 (2d Cir., filed July 9, 2001) (available at the Appendix). This 117-foot tower and antenna occupies a 1.81 acre section of what is now open park space surrounded by homes.[1] There are no other structures of its height in the vicinity and the TDWR dominates the vista. Its presence in the area does not conform to the other buildings and structures in and around Gateway.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals in this case is erroneous in light of the plain meaning of the Gateway Act and involves the important federal question of whether the FAA can act in clear contravention of the will of the Congress as expressed in statute.

The Gateway Act plainly states that the recreation area shall include Floyd Bennett Field within the Jamaica Bay unit. The Act further provides that there can be no expansion of "air facilities" within the Gateway recreation area. The FAA's order approving the installation of a TDWR at Floyd Bennett Field within the parklands of Gateway violates the express language of the Gateway Act,

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[1] Ironically, in addition to the impacts on Gateway and the surrounding communities, the site itself fails to best accomplish the TDWR's safety objective. When the FAA first began to look for possible venues for TDWR facilities, the Site Selection Committee was seeking one site to cover LaGuardia Airport and another for Kennedy Airport. The Site Selection Committee did not even examine Gateway as a possible venue for the LaGuardia facility because the site did not meet the criteria required for the TDWR to achieve its safety purpose. Gateway was examined as a possible venue for the Kennedy facility and expressly rejected because it did not best achieve the safety purpose of the TDWR.

16 U.S.C. § 460cc-2(e) (1976), and therefore is not in accordance with the law.

As this Court held in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), statutes must be construed in accordance with the plain meaning of their terms and the intent of Congress. Congress made clear its intent when it created Gateway in 1972. It established the first urban national park in the country, with the goal of providing many city dwellers, particularly the less affluent, their "only real hope...to visit a unit of the national park system." H.R. Rep. No. 92-1392, at 4884 (1972). The park was specifically intended to provide recreational and aesthetic experiences for New Yorkers without the resources to visit the Grand Canyon, Yellowstone or other distant national parks.

A. The Gateway recreation area created by statute includes the lands the FAA intends to use for the TDWR

The Act defines the purposes and perimeters of the Gateway "recreation area" as follows:

> In order to preserve and protect for the use and enjoyment of present and future generations an area possessing outstanding natural and recreational features, the Gateway National Recreation Area (hereinafter referred to as the "recreation area") is hereby established.
>
> **(a) Composition and boundaries**
>
> The recreation area shall comprise the following lands, waters, marshes, and submerged lands in the

New York Harbor area generally depicted on the map entitled "boundary Map, Gateway National Recreation Area," numbered 951-40017 sheets 1 through 3 and dated May, 1972:

(1) Jamaica Bay Unit – including all islands, marshes, hassocks, submerged lands, and waters in Jamaica Bay, Floyd Bennett Field, the lands generally located between highway route 27A and Jamaica Bay and the area of Jamaica Bay up to the shoreline of John F. Kennedy International Airport.

16 U.S.C. § 460cc.

The Gateway Act on its face clearly states that the term "recreation area" includes all land and water listed, and not just those transferred to the administrative jurisdiction of the Secretary of the Interior, as the Court of Appeals provided. Had Congress intended to limit Section 460cc-2(e) to apply only to those lands transferred to the Secretary of Interior it would have done so explicitly. Instead, the Gateway Act expressly includes Floyd Bennett Field within the "recreation area" and hence within Gateway itself.

The Second Circuit Court of Appeals rejects petitioners' claim on the basis that the term "recreation area" in the statute includes only lands that have been transferred to the administrative jurisdiction of the Secretary of the Interior, and that this provision did not apply to Floyd Bennett Field, which has not been so transferred. However, as Judge Cardamone states in his dissent, this reading of the term "recreation area" clearly contradicts the plain language of the Gateway Act.

The majority errs in attempting to circumvent the plain meaning of the statute. The majority notes that the Gateway Act broadly carves out a number of "enclaves" within which other federal agencies may retain whatever administrative jurisdiction they previously enjoyed until such time as they voluntarily cede control to the Secretary of Interior. *See* 16 U.S.C. § 460cc-1(b). However, the mere fact that a statute establishes a general scheme does not preclude Congress from creating specific exceptions to that scheme, especially where the language used is clear and unambiguous. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) (invoking "the canon that specific provisions qualify general ones") (*citing Simpson v. United States*, 435 U.S. 6, 15 (1978)). In fact, the plain language of Section 460cc-2(e) creates precisely such an exception by permitting the Secretary of Transportation to retain only joint jurisdiction with respect to air facilities, presumably to give the Secretary of the Interior veto power over the installation of air facilities that might detract from the natural beauty of Gateway. *See* 16 U.S.C. § 460cc-2(e).

B. The statute plainly prohibits the construction of air facilities within the statutorily defined Gateway recreation area; the TDWR is such a prohibited air facility.

The Gateway Act makes clear that there can be no lawful expansion of air facilities at the site. Section 460cc-2(e) states:

> The authority of the Secretary of Transportation to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and

> which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with the establishment, maintenance, and operation of airway facilities: Provided, that nothing in this section shall authorize the expansion of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field.

Since the term "air facilities" is not defined, the Court must give it its ordinary meaning. As the Supreme Court held in *Chevron*, "[t]he ordinary meaning of the term 'facility' is some collection of integrated elements which has been designed and constructed to achieve some purpose." *See Chevron*, 467 U.S. at 860. Air facilities are numerous and varied in nature, but they all contain those "integrated elements" used to assist in the operation of an airport and air travel generally. Air facilities include hangers, lights used to direct aircraft to the runway, or radar towers used to detect inclement weather. TDWR, which consists of several integrated elements, including a tower and a building, is used to detect poor weather conditions such as "wind shear" and "microbursts" for the exclusive purpose of assisting air operations. *See Friends of Gateway v. Slater*, No. 99-4081, at 5 (2d Cir., filed July 9, 2001). Upon detection, air traffic controllers notify pilots, who in turn avoid the severe weather in their flight path. TDWR is an "air facility" because its sole purpose is to facilitate the arrival and departure of aircraft at Kennedy and LaGuardia Airports during inclement weather.

The FAA, an agency whose sole purpose is overseeing aviation, has implicitly acknowledged that TDWR is an air facility by the very fact it has undertaken the responsibility for its siting and installation. On the first page of its ROD, the agency relies upon two statutory provisions for its authority to issue an order with regard to TDWR

siting: The proposed action of installing a single TDWR to serve Kennedy and LaGuardia Airports is consistent with the responsibilities of the FAA Administrator under 49 U.S.C. Sections 44501 and 44502 *et seq.*" § 44501(a) provides in part:

> The Administrator of the Federal Aviation Administration shall make long range plans and policy for the orderly development and use of the navigable airspace and the orderly development and location of air navigation facilities.

Section 44502(a)(1) provides:

> The Administrator of the Federal Aviation Administration may acquire, establish, improve, operate and maintain air navigation facilities; and provide facilities and personnel to regulate and protect air traffic.

The agency cannot have its cake and eat it too. If TDWR is an "air navigational facility" for the purposes of FAA planning, establishment, and maintenance, it must also be an "air facility" for purposes of the statutory prohibition against expansion at Floyd Bennett Field. This provision of the Act and the clear intent of the Congress plainly prohibit installation of the TDWR at Floyd Bennett Field.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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